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Minutes of the IAG Committee
on Adverse Actions

May 18, 1979

Wilma Lehman of OPM's Workforce Effectiveness and Development chaired the meeting, assisted by Ann Ugelow of Executive Personnel and Management Development, Cynthia Field of Workforce Effectiveness and Development, and Paul Trause of OPM's Office of the General Counsel.

Proposed regulations concerning adverse action against SES appointees

Mrs. Lehman first introduced Ms. Ugelow, who spoke on proposed SES interim regulatory provisions of interest to the Committee and on some other actions not covered in the proposed interim regulations because of the lack of a statutory basis in the CSRA. Ms. Ugelow said that the draft regulations are now circulating through the OPM. It is anticipated that they will be published before July 13, when the SES becomes operational, and preferably by the end of June so that they will be included in the next printing of 5 CFR.

Draft interim Subpart F of Part 752 covers only two actions -- suspensions of over 14 days and disciplinary removals from the service. There are no draft regulatory provisions for suspensions of 14 days or less, for furloughs of 30 days or less, or for removal from SES for disciplinary reasons to a lower graded position. Since these matters are not covered in the CSRA, providing procedures might also involve the provision of an appeal right to MSPB. Executive Personnel and Management Development has asked OPM's Office of the General Counsel if an Executive order is needed to provide such an appeal.

The provisions concerning removal from SES during the probationary period for disciplinary (preappointment or postappointment) or performance parallel those of Part 315 for the competitive service, except that certain limited placement rights are given to those SES appointees who held a position in the civil service immediately prior to the entry into SES. Appointees who entered the SES from outside Government do not have placement rights. Post-probationary appointees have placement rights. A new probationary period is not required upon conversion on July 13; however, appointees who are serving a probationary or trial period at the time of conversion will have to complete a service requirement.

Provision for reductions in force of SES appointees have not yet been made in draft regulation. In general, the SES regulations reflect the requirements of the law, except for those concerning removal for performance reasons, i.e. provision of notice, 30-day notice period, etc. The informal hearing provided by law does not stay such a removal. MSPB regulations are vague on this provision.

Members had some questions and comments:

-- With the informal hearing, would MSPB have the authority to reverse an action? Ms. Ugelow thought not, that the hearing would merely provide a safety valve. Another member suggested that a complaint to the Special Counsel of a prohibited personnel practice would give the MSPB the authority to reverse an agency action.

-- If an Executive order were to provide for a demotion out of SES for conduct and were to give an employee an appeal right for such demotion, it would be a greater right than for one demoted for less-than-fully satisfactory performance. Was this the intent of the law? The CSRA distinguishes between actions based on performance and those based on conduct. The law provides greater appeal rights for actions based on conduct.

If members have further comments or suggestions, Ms. Ugelow suggests they call her at 632-6820.

Rundown on recent MSPB decisions

Mrs. Field discussed recent MSPB decisions on Part 752 actions taken under the new procedures, and on one Part 432 action. Of over 1,000 MSPB case decisions reviewed by WED staff since February, only 19 have involved substantive decisions on post-Reform cases. Of those, one was on an action taken under Part 432 with allegations of discrimination (age and race). The agency action was reversed because all but one of the instances of unacceptable performance were not upheld by substantial evidence. The allegations of discrimination were not upheld. Of the other 18 actions, 16 were sustained, a greater percentage than formerly, but of course based on a very limited sample.

Draft permanent Part 752

Mrs. Field outlined briefly some of the changes in the draft Part 752:

- Exclusions from the coverage of the regulation are incorporated in the body of the text.
- A change was made in the reasons for which an employee's representative can be disallowed, to speak to Senate staff members' concern that the previous language was too vague, possibly subject to abuse.
- The standard for taking adverse action now specifically says that agencies may not take actions based on reasons prohibited by 5 U.S.C. 2303 (prohibited personnel practices).
- A change in the wording on reason for the exception to the notice period for an emergency suspension during the notice period of a removal or indefinite suspension, again to reflect the concerns of Senate staff and others that the previous language was too broad and liable to abuse.

Please let Mrs. Field know of questions and concerns -- her number is 632-5623.

Discussion of performance-based actions and actions based on both performance and conduct

Paul Trause discussed an opinion of the General Counsel that Section 4303 of title

5 covers nonpreference eligibles in the excepted service for actions based solely on performance, but not actions involving reasons other than performance. Also, in OGC's view, OPM's interim regulations on chapter 43 of title 5 are sufficient for an agency to take actions under chapter 43. Certain groups have argued that the use of chapter 43 procedures is illegal until the agency's performance appraisal system is fully in place. Mr. Trause said that in his opinion, this argument is not supported by either the statute or the legislative history. Rather, Mr. Trause believes that Congress intended to allow agencies to take performance-based actions prior to the establishment of performance appraisal systems that meet all the requirements of Chapter 43. Before taking such actions, however, agencies must: (1) identify the critical elements of the employee's position; (2) define the performance standards associated with any critical element which the employee is not performing satisfactorily; (3) communicate the critical elements and performance standards to the employee; (4) provide the employee with a reasonable opportunity to demonstrate acceptable performance; and (5) meet the other procedural requirements of 5 U.S.C. 4303. It is important to realize that the critical elements and performance standards so identified must be applied to all other employees in the same position. He urged members to let OPM know of any problems arising with the use of interim procedures under Part 432, or with chapter 75 procedures where the reasons for the action were partially based on performance.

Questions and comments followed Mr. Trause' discussion:

- What about actions taken against intermittent employees under chapter 43, when the employees are in the competitive service? Should these employees be excepted from section 4303? Mr. Trause said that as the law was written, they must be excepted from chapter 43 entirely if they were to be excepted at all.
- What procedures should be used to remove employees who have been on injury compensation for more than one year and who are still unable to return to the job? Mr. Trause believes that chapter 75 procedures would be more appropriate. If the employees have not worked for a year and are not ready, willing, and able to work, they cannot be judged on performance and cannot be given an opportunity to improve performance. Thus, the use of chapter 43 is not appropriate.
- In a situation involving unacceptable performance only, when should the opportunity to show acceptable performance be given? Mrs. Lehman said that there is currently some impetus to require that this opportunity be given before the notice of proposed action, thus under most circumstances eliminating the need for extending the notice period.

Finally, a member put to those present a suggestion that an employee relations conference or seminar be considered for some time later this year. His agency would be glad to donate resources and space. Members agreed that this was an excellent idea. A small committee will be formed to consider plans for a conference.